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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-377

RICHARD I. LUDWIG,
APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

APPELLEE'S MOTION TO DISMISS

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Appellee, pursuant to Rule 16(1)(b) of the Rules of this Court moves to dismiss the appeal for want of a substantial federal question.

Opinion Below

The opinion of the Supreme Judicial Court of Massachusetts is reported in 1975 Massachusetts Advance Sheets 1994 and at 330 N.E. 2d 467.

Jurisdiction

The appellant invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(2).

Statement of the Case

The appellant, Richard I. Ludwig, was charged in the District Court, District of Northern Norfolk, with violation of G.L. c. 90, § 24(2)(a) (driving to endanger). He moved the District Court for a speedy jury trial, which motion was denied, a defendant not being entitled to a trial by jury in the first instance under the Massachusetts two tiered system of criminal trials. Upon conviction, appellant prosecuted an appeal, which is available as of right, to a six man jury. G.L. c. 278, § 18; G.L. c. 218, § 27A.

At the *de novo* proceedings, appellant moved to dismiss the complaint alleging that he was denied a jury trial in the first instance. The motion was denied and upon conviction appellant was fined twenty dollars. He then prosecuted exceptions to the Supreme Judicial Court of Massachusetts. The exceptions were overruled.

Questions Presented

Whether the denial of a trial by jury in the first instance when a *de novo* proceeding before a jury is available at the defendant's opinion presents a substantial federal question.

Argument

1. In *Duncan* v. *Louisiana,* 391 U.S. 145 (1968) this Court held that the due process clause of the Fourteenth Amendment made applicable to the states the jury trial provision of the Sixth Amendment. The holding in that

case was based upon the conclusion that, "trial by jury in criminal cases is fundamental to the American scheme of justice . . . ." *Ibid* at 149.

The two tiered system of criminal trials in Massachusetts does not interfere in any appreciable way with the criminal defendant's right to a jury trial. A defendant has an absolute right ultimately to be tried by a jury of his peers. It is submitted that appellant's contention that *Duncan* v. *Louisiana, supra,* in conjunction with *Baldwin* v. *New York,* 399 U.S. 66 (1970), requires trial by jury in the first instance, is not substantial.

While the right to trial by jury has been held to be fundamental within the meaning of the concept of due process, the application of general principles of the Sixth Amendment do not, and should not, necessitate a holding that specific applications of the concept in the federal system are binding upon the states. *See Johnson* v. *Louisiana,* 406 U.S. 356 (1972). (Powell, J. concurring). *Cf. Apodaca* v. *Oregon,* 406 U.S. 404 (1972).

Since, under the Massachusetts system, a criminal defendant cannot be ultimately adjudicated guilty of an offense without first having an opportunity to present the question to a jury, it cannot be said that Massachusetts is in violation of the mandate of *Duncan* v. *Louisiana, supra.*

2. The system of *de novo* review utilized by the Commonwealth of Massachusetts does not place an unconstitutional burden upon a defendant's Sixth Amendment right to a speedy trial.

In *Barker* v. *Wingo,* 407 U.S. 514 (1972) this Court outlined standards which courts should employ when considering a claim of denial of a speedy trial. They include, "Length of delay, the reason for delay, the defendant's assertion of his right, and prejudice to the defendant." *Ibid* at 530.

Language in *Colten* v. *Kentucky*, 407 U.S. 104, 118, 119 (1972) indicated that a speedy trial argument based on the standards announced in *Barker* does not present, in the circumstances of this case, a question of substantial merit. The court stated:

> "Proceedings in the inferior courts are simple and speedy, and . . . . the penalty is not characteristically severe. Such proceedings offer a defendant the opportunity to learn about the prosecutions case and, if he chooses, he need not reveal his own. He may also plead guilty without a trial and promptly secure a *de novo* trial in a court of general criminal jurisdiction."

The above language is applicable to the Massachusetts system as well. There is no unwarranted delay caused by the two tiered system and the opportunities for discovery and rapid disposition of proceedings in the lower court does not occasion prejudice to the defendant.

3. *Colten* v. *Kentucky*, *supra* at 119-20 also indicates that a double jeopardy attack on the two tiered system of criminal justice in Massachusetts is without merit. There an argument based on double jeopardy implications of the possibility of enhanced punishment upon *de novo* trial was summarily rejected.

The Massachusetts system does not allow the Commonwealth to "make repeated attempts to convict an individual for an alleged offense . . . ." *United States* v. *Green*, 355 U.S. 184, 187-88 (1957). Acquittal in the District Court is conclusive. It is only when a judgment of guilt is returned, and then only at the option of the defendant, that a re-trial is possible.

Conclusion

For the reasons stated, it is respectfully suggested that the appeal be dismissed for failure to present a substantial federal question.

Respectfully submitted,

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